

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re:)	
)	
Transaction Network Services, Inc.,)	CC Docket No. 95-155
TSYS Acquiring Solutions, LLC, and)	
Electronic Payment Systems, LLC)	
)	
Regarding FCC Jurisdiction and)	
RespOrg Responsibilities to Comply)	
with Part 52 of the FCC's Rules and)	
the SMS/800 Tariff Requirements)	
To: The Commission		

**REPLY TO
OPPOSITION TO MOTION TO STRIKE**

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Summary

TSYS Acquiring Solutions, LLC ("TSYS"), by its counsel, hereby submits its Reply to the "Opposition to Motion to Strike" (the "EPS Motion Opposition") filed by Electronic Payment Systems, LLC ("EPS") in this proceeding. As TSYS noted in its Motion to Strike,¹ EPS has asked the Commission to waive its 5-page limit on replies relating to an Application for Review so that EPS may submit a late-filed 11-page Reply with 97 pages of attachments (the "EPS Reply"). The late submission of this large quantity of material is an effort by EPS to resuscitate its Application for Review with material it did not present to the Wireline Competition Bureau (the "Bureau") below. The material is also not responsive to TSYS's Opposition to the EPS Application for Review (the "TSYS Opposition"). As a result, the EPS Reply violates Section 1.115(c) of the Commission's Rules (raising questions of fact or law not presented to the Bureau below), Section 1.115(d) (discussing matters not raised in the TSYS

¹ Motion to Strike and Opposition to Motion for Leave to Exceed Page Limits, filed by TSYS Acquiring Solutions, LLC, May 10, 2011 (CC Docket No. 95-155) (hereinafter referred to as the "Motion to Strike").

Opposition, and failure to timely file), and Section 1.115(f) (submitting a reply which exceeds the Commission's 5-page limit).² The violations of Section 1.115(c) also constitute violations of Section 155(c)(5) of the Communications Act,³ from which Section 1.115(c) derives.

The EPS Motion Opposition defending these actions continues EPS's practice of basing its arguments on what it wishes the FCC's rules were, rather than addressing the FCC's actual rules. In attempting to "gloss over" its violations, EPS fails to address the actual law or related arguments presented by TSYS in its Motion to Strike. As a result, EPS fails to provide any basis for the Commission to accept its lengthy and late Reply, or to consider the numerous new matters raised therein. The EPS Reply should therefore be stricken, EPS's belatedly-raised questions of fact and/or law, as well as all other matters improperly introduced by EPS on appeal, should be disregarded, and the Application for Review should be denied, as specifically mandated by Section 155(c)(5) of the Communications Act and Section 1.115(c) of the Commission's Rules.

I. EPS's Arguments Exacerbate Rather Than Mitigate Its Rule Violations

As discussed below, it is blatantly obvious that the EPS Reply contains extensive legal and factual assertions EPS failed to present to the Bureau below for consideration in violation of Section 1.115(c). Indeed, as noted in the Motion to Strike, EPS raised only two issues before the Bureau that remain relevant on appeal,⁴ and those two issues represent only a small portion of the matters presented in the EPS Reply. EPS effectively concedes this fact on the first page of the EPS Reply, where it argues for the Commission to consider the new matters presented,

² See 47 C.F.R. § 1.115(c), (d), and (f).

³ 47 U.S.C. § 155(c)(5). The relevant language in this provision is: "No such application for review shall rely on questions of fact or law upon which the panel of commissioners, individual commissioner, employee board, or individual employee has been afforded no opportunity to pass."

⁴ Motion to Strike at 4-5.

stating that “[t]o properly decide the issues as they relate to EPS and TSYS, as well as the rules that will apply throughout the industry, EPS believes it is in the best interest of all involved to provide the Commission with all information needed to make a sound and correct decision.”⁵

Apparently lost on EPS in making that ironic statement is that it directly acknowledges that EPS failed to provide the Bureau below “with all information needed to make a sound and correct decision.”

Of course, the very point of Section 1.115(c) is to prevent the behavior in which EPS has engaged, and “the Commission has reiterated that a party may not ‘sit back and hope that a decision will be in its favor, and then, when it isn’t, to parry with an offer of more evidence.’”⁶ EPS denigrates Section 1.115(c) and its related provisions, faulting TSYS for “making arguments based on the procedural rules of the Commission.”⁷ EPS’s defense of the EPS Reply is effectively that the Commission’s “procedural” rules should be ignored when inconvenient to EPS’s goals, and this argument merely demonstrate that EPS’s violations were willful ones. Far from exonerating EPS of its rule violations, the EPS Motion Opposition demonstrates that they are an intentional abuse of the Commission’s processes.

⁵ EPS Motion Opposition at 2. EPS presents similar language on Page 3 of the EPS Motion Opposition, stating that these new facts and arguments “are central to the very important decision the Commission must make. Such matters should be carefully considered by the Commission to enable it to make a fully informed and correct decision, not stricken.”

⁶ *National Science and Technology Network, Inc.*, 23 FCC Rcd 3214 (2008), at ¶ 13 (footnotes omitted) (*quoting Improving Public Safety Communications in the 800 MHz Band*, 20 FCC Rcd 1560, 1562 n.21 (2005) (*which quotes Colorado Radio Corp. v. FCC*, 118 F.3d 24, 26 (D.C. Cir. 1941))).

⁷ EPS Motion Opposition at 2.

Contrary to EPS's suggestion, however, the Commission is not free to ignore its rules (procedural or otherwise), or Section 155 of the Communications Act, merely because EPS does not like them. As the U.S. Court of Appeals for the D.C. Circuit stated in *BDPCS, Inc. v. FCC*,

Here, we can find no error in the Commission's procedural rulings. BDPCS concedes that the arguments in the First and Second Supplements were not timely raised to the Commission and never had been presented to the WTB. On the timeliness issue, this Court has held often enough that the Commission does not abuse its discretion when it "decline[s] to entertain a late-filed petition in the absence of extenuating circumstances prohibiting a timely filing." *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 200 (D.C. Cir. 2003). In fact, we have gone so far as to discourage the Commission from entertaining late-filed pleadings "in the absence of extremely unusual circumstances." *Id.* at 199–200. Here, we need not question whether the circumstances presented by BDPCS are adequately "extenuating" because BDPCS has never presented any excuse for its failure to raise its arguments in a timely manner. It follows that the Commission did not abuse its discretion by dismissing the untimely arguments.

If that were not sufficient, there remains the second procedural basis for the Commission's dismissal — BDPCS's failure to present the supplemental arguments to the WTB. This is an equally open-and-shut case: the Commission's rules do not permit the Commission to grant an application for review "if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." 47 CFR §1.115(c). The Commission abuses its discretion when it arbitrarily violates its own rules, not when it follows them.⁸

Here too we have an "open and shut case." EPS has violated multiple provisions of the Commission's Rules, as well as the Communications Act. Its suggestion to the effect that the FCC should join EPS in willfully ignoring those provisions only aggravates the severity of its offense.⁹

⁸ 351 F.3d 1177 (D.C. Cir. 2003).

⁹ The Commission has in fact rejected the argument that it will make better decisions on appeal by considering matters not properly raised below. See *Teleport Communications Atlanta, Inc.*, 17 FCC Rcd 19859 (2002), at ¶ 24, *petition for review denied*, *Georgia Power Co. v. Teleport Communications Atlanta, Inc.*, 346 F.3d 1033 (11th Cir. 2003) ("GPC argues that it is in the public interest to include the additional new data because it provides a useful and informative case study for calculating average number of attachers. However, the data and calculations accompanying GPC's reply were never submitted to the Bureau. This is the type of information that GPC should have provided in response to the complaint. We cannot condone GPC's failure to provide the appropriate information at the required time.") (citing 47 C.F.R. § 1.115(c)).

II. EPS's Late and Lengthy Reply Plainly Violates Sections 1.115(d) and 1.115(f), and Its Legal Rationalizations Do Not Alter That Fact

As it has throughout this proceeding, EPS in its Opposition creates legal fiction upon legal fiction, and then touts these fictions to either find fault with TSYS or to attempt to explain away EPS's violations. EPS's claims are, however, long on sophistry and short on substance.

For example, the EPS Motion Opposition reiterates the claim made in EPS's "Reply Regarding Motion for Leave to Exceed Page Limits" that because it was responding to both the TSYS Opposition and the Transaction Network Services, Inc. Opposition (a false statement in itself¹⁰), EPS was entitled to 10 pages (2 x 5 pages) of reply rather than 5 pages. Defending its decision to file an 11-page reply with 97 pages of attachment, the EPS Motion Opposition berates TSYS for challenging "what amounts to one additional page in its reply."¹¹ EPS's argument rests upon two legal fictions. The first is that the explicit 5-page limit on replies found in Section 1.115(f) somehow evaporates when a proceeding contains two oppositions. Despite multiple oppositions to an Application for Review being a common occurrence at the FCC, Section 1.115(f) lists no such exceptions to the 5-page limit, and EPS produces no support for this claim.

The second legal fiction is EPS's claim that it was entitled to file two 5-page replies, one against TSYS and one against TNS, and that it was just doing the Commission a favor by consolidating them and throwing in an 11th page for good measure. Setting aside for the moment that the EPS Reply did not even *mention* the TNS Opposition, much less dedicate 5 pages to

¹⁰ As noted in the TSYS Motion to Strike at pages 8-9, the Transaction Network Services, Inc. ("TNS") Opposition is not mentioned even once in the EPS Reply, exposing EPS's claim that the excessive length of its reply is the result of having to respond to both oppositions as a complete fabrication.

¹¹ EPS Motion Opposition at 3.

responding to it,¹² EPS's fundamental assertion is false. Section 1.45 of the Commission's Rules, which establishes the basic rules for all pleadings at the Commission, plainly states that "[t]he reply shall be limited to matters raised in the oppositions, *and the response to all such matters shall be set forth in a single pleading; separate replies to individual oppositions shall not be filed.*"¹³ As a result, EPS's claim that it was entitled to file multiple 5-page replies is false, and its resulting theory that it is therefore entitled to exceed the five page limit when filing an allegedly "consolidated" reply is also false.

EPS fares no better in trying to defend the late filing of the EPS Reply, spending nearly two pages of the EPS Motion Opposition in a convoluted "explanation" as to why its filing was timely. Because the Commission is quite familiar with its own rules, and can easily determine for itself that the EPS Reply was filed late, there is no reason for TSYS to expend ink here walking the Commission through the actual date calculation. However, it is worth taking a moment to assess the timeliness argument being made by EPS, as it is so consistent with EPS's pattern of inventing whatever legal standard suits its current needs.

Defending its time calculation, EPS states that: "In determining the beginning date for a filing period FCC rule 1.4(b) states that '[u]nless otherwise provided in § 1.4(g) and (h), it is immaterial whether the first day is a holiday.'"¹⁴ Amazingly, EPS proceeds to turn this very clear language completely on its head, claiming that EPS was entitled to not count holidays at the beginning of the response period. In making this bizarre claim, EPS ignores the very language its quotes above: "*unless otherwise provided* in § 1.4(g) and (h)." Section 1.4(h) and (g) *do not provide otherwise*, and Section 1.4(b)'s admonition that "it is immaterial whether the first day is

¹² See *supra* Note 10.

¹³ 47 C.F.R. § 1.45(c) (emphasis added).

¹⁴ EPS Motion Opposition at 9 (quoting 47 C.F.R. § 1.4(b)) (emphasis omitted; brackets in original).

a holiday” therefore applies. While Section 1.4(h) (service by mail) is *applicable* to the calculation, it *does not provide otherwise* with regard to the start date of the calculation.

EPS then proceeds to disingenuously argue that regardless of its fallacious argument on time calculation, the EPS Reply was timely because the TNS Opposition it was also responding to was filed after the TSYS Opposition. Once again, its argument is based upon two fictions. The first is the legal fiction that the subsequent filing of an opposition by another party automatically extends a party’s reply period. The Commission’s Rules provide for no such automatic extensions, and EPS did not seek a waiver to delay its filing against TSYS in light of the TNS Opposition. The second fiction is factual rather than legal. As noted in the TSYS Motion to Strike,¹⁵ the EPS Reply did not even *mention* the TNS Opposition, much less respond to it in any way. As a result, there is no basis whatsoever for EPS to now claim that it needed the additional time to respond to the TNS Opposition, *because it did not respond to it*. Notably, the EPS Motion Opposition does not even attempt to dispute that EPS ignored the TNS Opposition entirely, and that its claim in the EPS Reply that it needed many more pages in order to address both the TSYS and TNS Oppositions was a complete fabrication.

It is therefore all the more astonishing that, unable to refute the fact that it completely ignored the TNS Opposition, EPS now seeks to repeat this thoroughly discredited claim as grounds for needing not just additional pages, but also additional time to file the EPS Reply. EPS greatly exceeded the page limit, and the time limit, and can present no justification for either. As discussed below, this pattern of contorting the law and the facts to suit its needs permeates the EPS Motion Opposition.

¹⁵ TSYS Motion to Strike at 8-9.

III. EPS Seeks to Distract the Commission From Its Violations of Section 1.115 by Asserting a False Legal Standard and Then Claiming Its Conduct Complies With That Fictional Standard

In an effort to gloss over EPS's violations, the EPS Motion Opposition does not address the violations of Section 1.115(c) and (d) separately, but instead conflates them in a manner designed to suggest that if a fact or argument was raised by anyone at any time at any level of the Commission during the entire history of this proceeding, then tangential matters raised in the EPS Reply comply with all Commission Rules. EPS's shorthand for this argument is that "[n]one of the items TSYS raises [in the Motion to Strike] are 'wholly new' and TSYS cannot claim in good faith that any of the issues have taken it by surprise."¹⁶ Of course, that is not the standard under either Section 1.115(c) or (d), and as noted in TSYS's Motion to Strike, in order to be considered by the Commission, material in the EPS Reply must comply with *both* Section 1.115(c) and (d), not just one or the other. By incorrectly blending its analysis of these separate Commission requirements, the EPS Motion Opposition fails to provide the Commission with any useful response to the Motion to Strike.

In addition, despite being the linchpin of its rebuttal, the phrase "wholly new" is not to be found in either Section 1.115(c) or (d). Thus, EPS's claim to have introduced nothing "wholly new" is meaningless, even if it were actually true. Instead the requirement for Section 1.115(c) is:

"No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass."

And for Section 1.115(d), the operative requirement is that replies:

"shall be limited to matters raised in the opposition."

47 C.F.R. §1.115(c), (d).

¹⁶ EPS Motion Opposition at 3.

Thus, any matters raised in the EPS Reply that do not directly respond “to matters raised in the opposition” violate Section 1.115(d) whether or not they are “wholly new” to the proceeding. Similarly, if EPS failed to first present a question of fact or law to the Bureau below, Section 1.115(c) prohibits EPS from raising it on appeal, either in its Application for Review or in the EPS Reply. The question is therefore not how EPS chooses to define “wholly new”, but whether EPS properly gave the Bureau first crack at a question of fact or law before attempting to now raise it on appeal. As noted in the Motion to Strike, it did not.

IV. The Contortions of Fact, Law, and Logic Found in the EPS Motion Opposition Only Serve to Confirm That the Content of the Lengthy EPS Reply Is Improper

As noted above, While EPS seeks to conflate the Section 1.115(c) and (d) analyses, and to then stretch facts past the breaking point to argue that a claim is permissible under either (c) or (d), that approach is fundamentally flawed. If EPS raised a question of fact or law on appeal which it failed to raise before the Bureau, the Application for Review cannot be granted under the explicit terms of Section 1.115(c), or of Section 155 of the Communications Act. *In addition*, if the EPS Reply raised matters that were not raised in the TSYS Opposition, such matters may not be considered. As a result, any matter in the EPS Reply that fails *either* the 1.115(c) test or the 1.115(d) test may not be considered. The only difference is the degree of exclusion, with matter submitted in violation of Section 1.115(c) tainting the entire appeal and prohibiting grant of EPS’s Application for Review, as opposed to just requiring rejection of the EPS Reply.

In the EPS Motion Opposition, EPS fails to rebut any of the examples presented in the Motion to Strike of improper material contained in the EPS Reply. Instead, EPS engages in nearly comical misreadings of the record to claim that a question of fact or law was raised before the Bureau or in the TSYS Opposition. In this regard, it is also worth noting that merely being

related to a question of fact or law presented to the Bureau is inadequate for a new question of fact or law to pass muster under Section 1.115(c). The question of fact or law presented to the Commission must be *the same one* presented to the Bureau. Thus, in *Kenny D. Hopkins*,¹⁷ the Commission cited Section 1.115(c) in rejecting an applicant's argument on appeal that its broadcast signal overlap with another station was *de minimis*, when it had argued before the Media Bureau below that there was no signal overlap at all.¹⁸ The EPS Reply does not seek to raise the same questions presented to the Bureau below. The EPS Motion Opposition relies on, at best, vaguely asserted connections with matters raised before the Bureau. Even if such connections existed, they would not comply with the restrictions of Section 1.115(c).

To save the Commission the effort of sorting through the miasma of half-truths and outright fiction EPS presents, TSYS briefly addresses below each of EPS's responses to the examples presented in the Motion to Strike of new matter improperly raised by EPS on appeal.

1. "*A prohibition on transfers would conflict with 'standard industry practice.'*"¹⁹

(a) **Section 1.115(c) Analysis** – EPS does not even claim to have raised this issue before the Bureau. Instead, it claims the issue was raised by TSYS, solely by attaching to its original Petition an EPS declaration filed in Arizona that contained a single reference to industry practice *in mergers*. Obviously, TSYS did not assert in its Petition below that such toll free number transfers were "standard industry practice" (or even that they were not, since it bore no relevance to the non-merger question at issue). As a result, EPS's claim was never raised before the Bureau. Furthermore, an examination of the TSYS Petition reveals that the EPS court declaration was included solely to demonstrate that EPS had initiated illegal collection actions on the TSYS toll free numbers, and in doing so had submitted to the federal courts a declaration aimed at deceiving those courts into believing that toll free numbers are legally transferable.²⁰ Clearly, the issue of "standard industry practice" was not before the Bureau.

(b) **Section 1.115(d) Analysis** – The sole support offered by EPS for its claim that it was responding to a matter raised in the TSYS Opposition is an FCC quote in the TSYS

¹⁷ 5 FCC Rcd 604 (1990).

¹⁸ *Id.* at ¶ 12.

¹⁹ TSYS Motion to Strike at 5.

²⁰ TSYS Petition at 8.

Opposition. That quote, offered in support of TSYS's argument that EPS's appeal seeks rulemaking remedies unavailable in an adjudicatory proceeding, is "[a]n adjudicatory proceeding involving a specific application is not the proper forum for requesting changes in Commission procedures and processing guidelines, or for seeking changes in well-established ... priorities."²¹ The Commission's language, addressing purely legal matters, does not relate in any way to the factual question of "standard industry practices."

RESULT: New matters improperly raised in violation of both Sections 1.115(c) and (d).

2. "A prohibition on transfers would conflict with case law, specifically *Ford Motor Co. v. United States Auto Club*...."²²

- (a) **Section 1.115(c) Analysis** – EPS's only response is that both the TSYS Petition and the Bureau's Declaratory Ruling make the *factual* statement that the FCC has only directed the transfer of a toll free number "in extraordinary circumstances involving public safety."²³ That of course has nothing to do with EPS's *legal* assertion that a prohibition on transfers would conflict with case law, an argument not made by EPS before the Bureau.
- (b) **Section 1.115(d) Analysis** – As the introduction of this material by EPS on appeal is prohibited by Section 1.115(c), any arguments relating to it in the EPS Reply are impermissible (and in fact prohibit grant of the Application for Review) regardless of whether it is responsive to any material in the TSYS Opposition.

RESULT: New matters improperly raised in violation of Section 1.115(c).

3. "A prohibition on transfers would impose a 'huge burden' on the FCC, commerce, and the economy."²⁴

- (a) **Section 1.115(c) Analysis** – EPS points to nothing in the pleadings before the Bureau raising the factual question of whether a prohibition on transfers would burden the FCC, commerce, and the economy, and the Bureau's Declaratory Ruling did not address that question.
- (b) **Section 1.115(d) Analysis** – EPS notes only that TSYS raised concerns about the harm to merchants served by TSYS if the toll free numbers they rely on for payment card processing were transferred from TSYS to EPS. EPS is free to refute that claim. However, it is not free to raise an entirely different matter, namely the burden on the FCC and others arising from a blanket prohibition on the transfer of toll free numbers. That is not a matter "raised in the opposition."²⁵

²¹ TSYS Opposition at 15-16 (ellipsis in original) (quoting *Deer Creek Broadcasting, LLC*, 23 FCC Rcd 9553 (MB 2008), at ¶ 7).

²² TSYS Motion to Strike at 5.

²³ EPS Motion Opposition at 4.

²⁴ TSYS Motion to Strike at 5.

²⁵ See 47 C.F.R. § 1.115(d).

RESULT: New matters improperly raised in violation of both Sections 1.115(c) and (d).

4. *“In an act of ‘unmitigated hypocrisy,’ TSYS itself previously violated the prohibition on toll free number transfers when it acquired three of the toll free numbers from VITAL.”*²⁶

- (a) **Section 1.115(c) Analysis** – This is a purely factual question not raised by EPS before the Bureau or even in its Application for Review, and EPS does not contest that it failed to raise it previously. Moreover, as noted in TSYS’s Motion to Strike, it is a false statement of fact, as no such transfer occurred, since TSYS and VITAL are the same company (merely having undergone a name change). As reprehensible as it was for EPS to make this false claim only at the conclusion of the pleading cycle in the EPS Reply, it is even more reprehensible for EPS to continue to assert this “fact” in the EPS Motion Opposition, having clearly been informed of its falsity.
- (b) **Section 1.115(d) Analysis** – EPS fails to point to anything in the TSYS Opposition to which this argument was meant to respond, making it an uncontested violation of Section 1.115(d).

RESULT: New matters improperly raised in violation of both Sections 1.115(c) and (d).

5. *“TSYS ‘is using the FCC processes to refuse to move the non-EPS merchants to different numbers, which is not properly an issue of FCC concern as it has nothing to do with number assignment.’ ‘The Commission should make it clear that its ruling is not intended to interfere with the remedy awarded by the Court to separate the EPS traffic from the non-EPS traffic.’”*²⁷

- (a) **Section 1.115(c) Analysis** – EPS points to nothing in the pleadings before the Bureau that raises the question of whether TSYS can be forced to move its merchants off of toll free numbers for which it is the subscriber of record.²⁸ Instead, EPS points to its argument that the FCC should permit the numbers to be transferred—a completely different matter. As to EPS’s additional request for a new remedy not sought below, namely that the FCC “should make it clear that its ruling is not intended to interfere with the remedy awarded by the Court to separate the EPS traffic from the non-EPS traffic,” that is *per se* improper. As stated by the Commission itself, “the supplement is also procedurally deficient because it raised new questions of law *and seeks a new remedy* that were not presented to the Bureau.”²⁹ Section 1.115(c) requires that the Bureau be permitted the opportunity to address all questions of fact and law, including the availability of requested remedies, before those matters can be presented to the Commission.

²⁶ TSYS Petition at 5.

²⁷ TSYS Motion to Strike at 6 (quoting the EPS Reply at 8).

²⁸ EPS Motion Opposition at 6.

²⁹ *BDPCS, Inc.*, 15 FCC Rcd 17590 (2000), at ¶ 10, *petition for review denied*, *BDPCS, Inc. v. FCC*, 351 F.3d 1177 (D.C. Cir. 2003).

- (b) **Section 1.115(d) Analysis** – The TSYS Opposition did not raise the question of whether it could be forced to move its merchants off of its own toll free numbers in the absence of a transfer of those numbers to EPS. EPS introduced that issue for the first time in the EPS Reply. Moreover, as TSYS noted in its Motion to Strike, EPS would lack standing to seek this remedy in any event, since the court in Arizona has stayed its order to move the TSYS merchants off of the numbers and transfer the numbers to EPS pending the outcome of EPS’s FCC appeal.³⁰

RESULT: New matters improperly raised in violation of both Sections 1.115(c) and (d).

6. *“TSYS submitted false declarations to the Court, stating there was only one RespOrg providing only three toll free numbers, when in fact there were two RespOrgs providing at least seven numbers.”*³¹

- (a) **Section 1.115(c) Analysis** – EPS points to nothing in the pleadings before the Bureau raising this factual question, instead merely claiming that the Bureau “has been aware of this issue throughout these proceedings.”³² Having not raised it before the Bureau, EPS’s belated claim that the Bureau “has been aware” of it is meaningless. The fact that there was originally confusion over how many TSYS toll free numbers had at least one EPS merchant using them is an entirely different matter than EPS’s new claim that “TSYS submitted false declarations to the Court....” If EPS thought this question of fact relevant, it could certainly have made that accusation before the Bureau, but it did not.
- (b) **Section 1.115(d) Analysis** – The only statement in the TSYS Opposition that EPS now claims to be responding to is the general statement that it eventually became clear over the course of the dispute that seven TSYS toll free numbers were being used by various EPS merchants.³³ EPS does not challenge that the quantity of TSYS toll free numbers used by EPS is seven, or the number of RespOrgs associated with them. As a result, there is nothing raised in the TSYS Opposition for EPS to respond to. Instead, the EPS Reply launches a brand new character attack on TSYS based on factual assertions unrelated to any “matters raised in the opposition.”³⁴

RESULT: New matters improperly raised in violation of both Sections 1.115(c) and (d).

³⁰ TSYS Motion to Strike at 6 n.20.

³¹ TSYS Motion to Strike at 6.

³² EPS Motion Opposition at 7.

³³ See EPS Motion Opposition at 7.

³⁴ See 47 C.F.R. § 1.115(d).

7. *"The 'industry numbering guidelines for 855 numbers expressly recognize [transfers], requiring only after-the-fact notices of changes in subscriber of record names.'"*³⁵

- (a) **Section 1.115(c) Analysis** – EPS's only argument here is that the TSYS Petition made the factual statement that the FCC has only directed the transfer of a toll free number "in extraordinary circumstances involving public safety."³⁶ That factual statement of course has nothing to do with the EPS's assertion that: (1) a third party's industry numbering guidelines for a type of telephone number unrelated to the toll free numbers in this proceeding (2) "expressly recognize transfers requiring only after the fact notices of changes."³⁷ The legal question of whether these guidelines bear any relevance to this proceeding was not presented to the Bureau, nor was the factual claim that they "expressly recognize transfers requiring only after the fact notices of changes" presented to the Bureau. Once again, EPS is seeking on appeal to "rel[y] on questions of fact or law upon which the designated authority has been afforded no opportunity to pass."³⁸ As with the other examples above, the connections EPS seeks to draw with matters before the Bureau are beyond tenuous, and certainly come nowhere close to qualifying as the same questions raised below.
- (b) **Section 1.115(d) Analysis** – As the introduction of this material by EPS on appeal is prohibited by Section 1.115(c), any arguments relating to it in the EPS Reply are impermissible (and in fact prohibit grant of the Application for Review) regardless of whether it is responsive to material in the TSYS Opposition.

RESULT: New matters improperly raised in violation of Section 1.115(c).

In short, the EPS Motion Opposition fails to rebut even a single one of the examples presented by TSYS of improper material introduced by the EPS Reply in violation of Section 1.115(c) and (d). Since *all* of these examples violate Section 1.115(c), that rule provision explicitly prohibits the grant of EPS's Application for Review, making EPS's repeated violations of Section 1.115(d) just additional grounds for striking the EPS Reply. Moreover, because Section 1.115(c) merely reiterates the statutory prohibition found in Section 155(c)(5) of the Communications Act requiring that "[n]o such application for review shall rely on questions of fact or law upon which the panel of commissioners, individual commissioner, employee board,

³⁵ TSYS Motion to Strike at 6 (quoting the EPS Reply at 6).

³⁶ EPS Motion Opposition at 4.

³⁷ EPS Motion Opposition at 8.

³⁸ 47 C.F.R. § 1.115(c).

or individual employee has been afforded no opportunity to pass,” the statutory requirement that the Application for Review be denied is not subject to waiver or modification by the Commission.³⁹

Conclusion

The EPS Reply contains extensive material submitted in violation of Section 155 of the Communications Act, and Section 1.115 of the Commission’s Rules. In light of this, the EPS Reply and all arguments belatedly raised by EPS on appeal should be stricken, and the EPS Application for Review should be denied, as it is apparent that even in the absence of the EPS Reply, EPS’s Application for Review “relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.”⁴⁰ EPS concedes that it failed to provide the Bureau “with all information needed to make a sound and correct decision,”⁴¹ and its effort to belatedly supplement the record on appeal, particularly at the reply stage, wastes the resources of the Bureau, the Commission, and TSYS. Section 155 of the Communications Act and Section 1.115 of the Commission’s Rules make clear the mandatory penalty for abusing the Commission’s processes in this manner. Far from being granted the special treatment it seeks,

³⁹ See 47 U.S.C. § 155(c)(5).

⁴⁰ 47 C.F.R. § 1.115(c).

⁴¹ EPS Motion Opposition at 2.

EPS must be accorded the treatment required by law—the striking of the EPS Reply, and denial of its Application for Review.

Respectfully submitted,

TSYS ACQUIRING SOLUTIONS, LLC

By: 

Scott R. Flick
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Its Counsel in this Matter

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Dated: June 6, 2011


CERTIFICATE OF SERVICE

I, Carolyn Henry, a secretary with the law firm of Pillsbury Winthrop Shaw Pittman LLP, hereby certify that a copy of the foregoing **"REPLY TO OPPOSITION TO MOTION TO STRIKE"** was served via first class U.S. mail, postage pre-paid, on this 6th day of June, 2011, to the following:

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